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Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1990

STATE OF ALABAMA

PETITIONER,

V.

JOE LOUIS HARRELL

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT AND COURT
OF CRIMINAL APPEALS OF ALABAMA

APPENDIX TO THE PETITION

OF

JAMES H. EVANS
ATTORNEY GENERAL

AND

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR PETITIONER

ADDRESS OF COUNSEL

Office of the Attorney General
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

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APPENDIX A

[RELEASED: MARCH 31, 1989]

THE STATE OF ALABAMA - - - JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1988-89

1 Div. 779

Joe Louis Harrell

v

State

Appeal from Mobile Circuit Court

BOWEN, JUDGE

Joe Louis Harrell was convicted for the unlawful possession of cocaine in violation of

Ala. Code 1975, §13A-12-212, and sentenced to 30 years' imprisonment. He was also convicted of possession of marijuana in the second degree in violation of Ala. Code 1975, §13A-12-214, and sentenced to six months' imprisonment. Harrell raises six issues on this appeal from those convictions.

I.

The defendant argues that the prosecutor used five of its peremptory challenges in a racially discriminatory manner in violation of Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), and Ex parte Branch, 526 So. 2d 609 (Ala. 1987). We find that this matter has not been preserved for review.

The record shows that, after the jury had been selected, the following occurred:

> "MR. DEEN [Defense Counsel]: If we could approach before you swear'em in.

"THE COURT: Sure.

"(A sidebar conference was had, off the record.)

"(A sidebar conference was had, on the record.'

"THE COURT: Okav. Well just let the record reflect that Mr. Deen wants to make a Batson objection and we'll take it up at the next recess.

"MR. DEEN: Okay. Just let the record reflect that before the jury was empanelled I objected.

"THE COURT: Members of the jury, would you please stand and take the oath.

"(The jurors were sworn.)."

After two witnesses for the prosecution had testified, the trial judge declared a recess. After the trial judge discussed the matter of a motion to suppress with defense counsel, the following occurred:

"THE COURT: The other thing, you had a Batson motion. You want to state it to the Reporter? State your position.

"MR. DEEN: Yes, sir. You want me to go ahead and do it now?

"THE COURT: Go ahead and do it now and she can read . . .

"(The Judge exits the courtroom.)

"MR. DEEN: The Defendant objects to the empanelling of this jury. My objection was reserved prior to the jury being sworn in and this is my opportunity to state the grounds."

Defense counsel then stated the grounds of his objection, after which the prosecutor responded by giving the reasons why she struck the five black venire persons. After the prosecutor's comments appears the following: "(Lunch recess.)" When the trial resumed there was no mention of the Batson issue. In fact, our review of the record discloses no additional reference to this matter. There is no indication in the record that the trial judge ever ruled on this objection.

"An adverse ruling is a preliminary requirement to preservation of error and appellate review. . . . Absent an adverse ruling the issue of the objection is not properly before this court." Van Anrwerp v.

State, 358 So.2d 782, 790 (Ala.Cr.App.), cert. denied, Ex parte Van Antwerp, 358 So.2d 791 (Ala. 1978). "A party cannot claim error where no adverse ruling is made against him." Holloway v. Robertson, 500 So.2d 1056, 1059 (Ala. 1986). An adverse ruling by the trial judge is a prerequisite for preserving the alleged error for appellate review. Borden v. State, 523 So.2d 508, 511 (Ala.Cr.App. 1987). There is no contention that the trial refused to consider or rule on the objection.

It is a fundamental principle of appellate review that the reviewing court is bound by the record. "The appellant has the duty of checking his record before submitting his appeal . . .; it is his burden to file a correct record." Tyus v. State, 347 So.2d 1377, 1380 (Ala.Cr.App.). cert. denied, Ex parte Tyus, 347 So.2d 1384 (Ala. 1977).

The record on appeal does not contain the voir dire of the jury venire. That record

does not disclose the racial composition of either the venire or the trial jury. The record does show that the trial judge did not hear or rule on the grounds of the defendant's Batson objection.

Although we strongly disapprove of the handling of the Batson objection in this case, the record contains no objection to the procedure followed in the trial court.

Under these circumstances, the record before this Court does not permit a finding of error.

II

The defendant argues that his conviction for possession cannot stand because the contraband was not abandoned property and because the seizure of that property was the result of a prior illegal search.

On January 2, 1988, Mobile Police Officer Ronald Burch went to a "skinhouse" in

Mobile. His informant had told him that the defendant "was holding some rocks," and was "up inside the skinhouse." Officer Burch testified that his purpose in going to the house "was going in and finding out if he had contraband;" "I went up inside the skinhouse to check and see if the narcotics were there like I was advised they were."

There were 15 or 20 people inside the house drinking, gambling, and playing cards. Officer Burch saw the defendant and Theresa Williamson sitting at the end of a table. He observed the defendant's hand "go up under the table." The officer then ordered everyone "to get up side the wall" for his protection "so [he] could look up under the table." He looked under the table where the defendant had been sitting and "picked up some objects ['some narcotics'] off the floor." The officer asked "if anybody knew who it belonged to" but received no response. Officer Burch

made no arrests and left the premises. However, he testified that he decided "to remain in the area because . . . the information I received, I felt like it was good information so I was going to remain in the area to see if I could make an arrest later."

The "skinhouse" was a residential-type of house although no one lived there. It was rented by a man named Cornelius Senior.

Officer Burch "circled the block a couple of times" and "more or less hung around in the area." A short time after he left the house, Officer Burch observed the defendant standing at the passenger's side of a car with the door open. The defendant looked at Officer Burch, turned, and "hollered something." The defendant got inside the car. As the car was being driven away, Officer Burch observed the passenger door open and saw the defendant "throw home articles to

the ground." These articles were "several clear plastic packages" which were later discovered to contain marijuana and crack cocaine. The officer picked up a package and began pursuing the vehicle. During this pursuit, the defendant exited the car but was soon arrested, as were the other two occupants of the car.

We agree with the Attorney General in his argument that the defendant had no standing to object to the search at the skinhouse.

Officer Burch's mere presence in the skinhouse was not a search. Maryland v. Macon, 472 U.S. 463, 468-69, 105 S.Ct. 2778, 2781, 86 L.Ed.2d 370 (1985). "If a police officer has entered as would any member of the public, it is not a search for the officer to conduct himself therein as might be expected of any other person who would enter." W. LaFave, 1 Search and Seizure, §2.4(b) at 430

(2nd ed. 1987). "Quite clearly, the officer is 'entitled to take note of objects in plain view.' He may also examine merchandise in the same fashion that a prospective customer could be expected to do." Id.

The defendant has made no showing that he had any standing to object to what occurred in the skinhouse. From the record:

> "THE COURT: Is there any reasonable expectation of privacy in this place?
>
> "MR. DEEN [Defense Counsel]: We don't know."

The defendant has failed to carry his burden of proving that he had a legitimate expectation of privacy in the skinhouse. Rawlings v. Kentucky, 448 U.S. 98, 104-05, 100 S.Ct. 2556, 2561, 65 L.Ed.2d 633 (1980); Collier v. State, 413 So.2d 396, 400 (Ala.Cr.App. 1981), affirmed, Ex parte Collier, 413 So.2d 403 (Ala. 1982). "Whether [the defendant] was legitimately on the premises is a relevant but not controlling or

determinative factor in deciding one's expectation of privacy." Collier, 413 So.2d at 400; Ramires v. State, 492 So.2d 615, 619 (Ala.Cr.App. 1985). Merely "[b]eing a frequent visitor to premises is not sufficient to bring into play the Fourth Amendment rights against unreasonable search and seizure." Grice v. State, 527 So.2d 784, 787 (Ala.Cr.App. 1988).

The seizure of the packages of marijuana and cocaine discarded by the defendant was proper under the abandoned property exception to the general rule requiring a search warrant. Barrow v. State, 494 So.2d 834, 836 (Ala.Cr.App. 1986); Mitchell State, 423 So.2d 904 (Ala.Cr.App. 1982). Compare Harrell v. State, 475 So.2d 650 (Ala.Cr.App. 1985), involving this same defendant.

> "'In the law of search and seizure . . . the question is whether the defendant has, in discarding the property,

> relinquished his reasonable expectation of privacy so that its seizure and search is reasonable within the limits of the Fourth Amendment. * * * In essence, what is abandoned is not necessarily the defendant's property, but his reasonable expectation of privacy therein.
>
> > "'Where the presence of the police is lawful and the discard occurs in a public place where the defendant cannot reasonably have any continued expectancy of privacy in the discarded property, the property will be deemed abandoned for purposes of search and seizure.'". W. LaFave, 1 Search and Seizure §2,6(b) at 465, quoting from City of St. Paul v. Vaughn, 306 Minn. 337, 237 N.W.2d 365 (1975).

III

The informant in this case was a mere "tipster" and was not a participant in the crime and did not provide probable cause for the arrest. Therefore, the State was not required to disclose his identity. Ex parte Pugh, 493 So.2d 393 (Ala. 1986); Self v. State, 420 So. (Ala. 1982); Lightfoot v. State, 531 So.2d 57, 58-59 (Ala.Cr.App.

1988). In Pugh, 493 So.2d at 397, the Alabama Supreme Court rejected the proposition that disclosure of the informant's identity is required when that identity is sought on the issue of probable cause and where the State has made no showing of probable cause apart from the informant's identification. "In Alabama, the question of disclosure or nondisclosure of a confidential police informant's identity for the purposes of challenging probable cause is a matter of discretion for the trial court." Pugh, 493 So.2d at 397. The case of Hannah v. State, 497 So.2d 837 (Ala.Cr.App. 1986), relied on by the defendant, is hereby overruled to the extent that it conflicts with Pugh, supra.

IV

The defendant's motion for a mistrial was properly denied on two separate occasions.

A.

Officer Burch testified that he went to the skinhouse on the advice of an informant. Defense counsel objected and requested a mistrial. The trial judge sustained the objection but denied the mistrial. The judge then instructed the jury to disregard the officer's response and polled the jury to ensure that they could so do.

Contrary to the assertions of the defendant, we consider the actions of the trial judge sufficient to have cured any error in the officer's testimony. Burnett v. State, 453 So.2d 371, 372-73 (Ala.Cr.App. 1984); Waldrop v. State, 424 So.2d 1345, 1350 (Ala.Cr.App. 1982), cert. denied, Waldrop v. Alabama, 472 U.S. 1019, 105 S.Ct. 3483, 87 L.Ed.2d 618 (1985).

B.

The defendant's second request for a mistrial was prompted when the prosecutor

asked defense witness Alex Ball, "Have you been with the Defendant when he's been selling drugs before?"

The trial judge sustained defense counsel's objection and stated, "It certainly assumed facts which are not in evidence." The trial judge then stated to the jury: "I don't know why the question was asked. There's no evidence of it. He's not on trial for anything like that, ladies and gentlemen. So I ask that you please disregard the question opposed [sic] by the prosecutor." There was no request by defense counsel for any additional remedial action.

"The trial judge is in a better position than an appellate court to determine whether the remark was so prejudicial as to be ineradicable. Moreover, there is a prima facie presumption against error where the trial court immediately charges the jury to disregard the prosecutor's improper remark."

Wilson v. State, 428 So.2d 197, 200 (Ala.Cr.App. 1983); Ex parte Jefferson, 473 So.2d 1110, 1115 (Ala. 1985), cert. denied, Jefferson v. Alabama, 479 U.S. 922, 107 S.Ct. 328, 93 L.Ed.2d 300 (1986).

V

The prosecutor should not have been permitted to ask defense witness Alex Ball, "Have you ever been convicted of a felony or crime involving moral turpitude?" Such a question is improper. Agee v. State, 491 So.2d 1067, 1072 (Ala.Cr.App. 1986).

Ball responded that he had been convicted of theft and possession of cocaine. Theft is a crime involving moral turpitude, evidence of which is therefore admissible to impeach a witness. C. Gamble, McElroy's Alabama Evidence, §145.01(9)(k) and (o) (3d ed. 1977). The issue of whether the felony possession of cocaine, not involving sale or

distribution, is a crime involving moral turpitude for purposes of impeachment has not been decided in this state. See Ex parte McIntosh, 443 So.2d 1283, 1286 (Ala. 1983) (felony possession of marijuana does not involve moral turpitude).

However, the trial judge's error in overruling the objection was harmless because immediately before the prosecutor asked the question Ball had testified without objection that he was presently in jail for possession of cocaine. "It is not error to allow the same facts to be again shown against objection when they have already been proven without objection." Bush v. State, 282 Ala. 134, 139 209 So.2d 416 (1968). In his final instructions to the jury, the trial judge did not charge on the principles of impeachment on conviction of a crime. Rule 45, A.R.A.P.

VI

The defendant was sentenced as a habitual offender under Alabama's Habitual Felony Offender Act. Because his offenses were committed after October 21, 1987, the effective date of the Drug Crimes Amendment Act of 1987, Ala. Code (1975), §13A-12-210 et seq., he was not due to be punished as a repeat drug offender under the sentencing provisions of the Controlled Substances Act. Ex parte Chambers, 522 So.2d 313 (Ala. 1987). See also Ex parte Brannon [Ms. 87-843, February 10, 1989], ____ So.2d ____ (Ala. 1989).

The failure to object at the trial court level to the adequacy of the notice given and the method of proving prior offenses under the Habitual Felony Offender Act. Rule 6(b)(3)(iii), A.R.Cr.P.Temp., precludes consideration of those issues on appeal. Nichols v. State, 480 So.2d 82, 85

(Ala.Cr.App. 1985). Issues not raised at trial will not be considered on appeal. Jackson v. State, 502 So.2d 858, 865 (Ala.Cr.App. 1986); Faircloth v. State, 471 So.2d 485, 493 (Ala.Cr.App. 1984), affirmed, Ex parte Faircloth, 471 So.2d 493 (Ala. 1985).

The judgment of the circuit court is affirmed.

AFFIRMED.

All Judges concur.

[RELEASED MAY 12, 1989]

ON REHEARING

BOWEN, JUDGE

After our opinion on original submission had been issued and with regard to Part I of that opinion, Appellate counsel filed a motion to correct the record which was granted by the trial court.

The supplemental record shows that the prosecution used five of its eight peremptory challenges to remove blacks from the jury venire and that the jury was composed of seven whites and five blacks. The trial judge denied the Batson objection at a side bar conference held off the record after defense counsel argued his objection and the prosecutor explained the reasons for her peremptory strikes after the trial judge had absented himself from the proceedings.

Here, it is clear that the Batson-Branch objection was preserved and that the trial court did not comply with the

mandate of Batson and Branch. The reasons given by the prosecutor for using his strikes to eliminate blacks must be facially race neutral and the trial judge must find them to be credible. Scales v. State, 539 So. 2d 1074 (Ala. 1988). Consequently, Harrell's application for rehearing is granted and this Court's affirmance of March 31, 1988, is hereby set aside. This cause is remanded with directions that a-hearing be conducted in the presence of the trial judge to determine whether the guidelines of Batson, as interpreted by Branch, have been followed. The trial judge shall enter a written order of his findings of fact and conclusions of law. That order, along with a transcript of the hearing, shall be forwarded to this Court on return to remand.

OPINION EXTENDED;
APPLICATION FOR REHEARING GRANTED;
CAUSE REMANDED WITH DIRECTIONS.

All Judges concur.

APPENDIX B

[RELEASED MAY 9, 1989]

THE STATE OF ALABAMA - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1989-90

Ex parte: State of Alabama

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(Re: Jos Louis Harrell

88-1226 v.

State Of Alabama)

(Mobile Circuit Court, CC-88-830 & -831)

HORNSBY, CHIEF JUSTICE.

The defendant, Joe Louis Harrell, was convicted of possession of cocaine and other offenses in Mobile Circuit Court. He challenges that conviction, based upon the rule of law stated in Batson v. Kentucky, 476 U.S. 79 (1986).

Harrell was allegedly seen at a Mobile area "skin house" (local slang for a gambling

establishment) by two Mobile police officers who had entered the premises without a search warrant. The officers forced the occupants Of the premises to stand along a wall while they searched for contraband. Several persons were in the house at this time, and there was money lying out in plain view on a table. According to the officers, that money was being used in a card game when they walked in. Although no arrests were made at this time, the officers alleged that Harrell was seen reaching under a table as if to retrieve something hidden there.

The officers left the "skin house" without incident but stayed close by. One officer began to circle the block on which the skin house was located. A short time later, Harrell was seen standing near a car on the street. As the officer approached in his patrol car, Harrell allegedly "hollered something" and then jumped into the car and attempted to speed away from the scene. The

officer gave chase; he testified that he saw Harrell throw several articles out of the car during the chase. The officer further stated that he stopped and picked up these articles and then proceeded with the chase. The car was stopped some blocks later. Harrell had exited the car but was apprehended on foot a short distance away by another police officer.

The packages Harrell allegedly threw out of the car contained cocaine powder, crack cocaine, and marihuana. He was indicted on charges of possession of cocaine under Code 1975, §13A-12-212(a) 1, and possession of marijuana under Code 1975, §13A-12-213(a) 1. On June 8, 1988, the case came up for jury selection and trial.

Jury selection was not made a part of the recorded transcript of the proceedings. Harrell's defense counsel objected to the composition of the jury as empaneled, on the basis of Batson v. Kentucky, supra. Defense

counsel's objection was apparently overruled at a sidebar conference held off the record. The trial judge said that the Batson objection would be taken up at the next recess, but there was no further inquiry at that point. The jury was then sworn, and the trial commenced.

The record shows that at the next recess, the following exchange took place:

> "THE COURT: The other thing, You had a Batson motion. You want to state it to the reporter? State your position.
>
> "MR. DEEN: Yes, sir. You want me to go ahead and do it now?
>
> "THE COURT: Go ahead and do it now and she can read . . . ."
>
> "(The Judge exits the courtroom.) "MR. DEEN: The Defendant objects to the empaneling of this jury. My objection was reserved prior to the jury being sworn in and this is my opportunity to state the grounds.
>
> "There were twenty-eight people in the jury venire. Each side was allowed to have strikes. The Defendant is a black male on trial here and five of the State's strikes were of people of the black race.

"The first strike was number 11, a black male, James Buford, who answered none of the questions during voir dire at all. The jury list shows that he's employed as a helper at Moyer Allied. So we assert the only reason for him being . . . stricken was because he happened to be a black male.

"The State's second strike was number 12, Jesse Crook, who is a -- the only question he answered in voir dire was that his brother or brother-in-law was in security with the Mobile Police Department. He was struck and we would assert that the only reason evidently he was struck was by virtue of his race.

"Number 26, Margaret Powe, is a black female. She's listed as being a housewife. Her only question answered during voir dire is that she had been the victim of a burglary. We assert that the only reason that she was stricken was because of her race.

"The State's fifth strike was Robert Watt, who is a mechanic, an employed mechanic with Auto Saving Tire Company. His only question answered in voir dire was that he had been on [a] jury before in a criminal case and found the Defendant guilty. And we'd assert the only reason he was stricken was because of his race.

"Strike number eight was a black female had been a burglary victim. Her name was Dukes. She had a cousin who is a lawyer in the District of Columbia and she'd been on a jury this week on a criminal case and found the defendant

guilty. We assert the only reason for her being stricken was by virtue of her race.

"MS. MURPHY: what number was that?

"MR. DEEN: Number 8.

"Based on [Batson v. Kentucky] and those grounds asserted, we don't think that this is a fair and impartial group of folks to be sitting in trial of Mr. Harrell today.

"MS. MURPHY: First of all let me say that I was given two minutes by the Judge to decide who to strike and who not to. Herman Thomas, an assistant district attorney with our office, was in here during the striking of this jury and I enlisted Herman's aid in striking the jury. Incidentally, Herman Thomas is black.

"Some of these strikes Herman suggested to me because we didn't have much time and I just asked him to look down my list -- and he's lived here for a long time -- and pick out what was bad addresses, bad in the sense of high crime areas, areas where we probably would not want jurors for the State who perhaps might be sympathetic with the defendant. So some of those were based upon Mr. Thomas's suggestion based strictly from the review of the addresses on the jury list. It was not even indicated whether the potential juror was black or white.

"Eleven and 12 were both struck because asked the question during voir dire is there anybody who thinks that marihuana ought to be legalized. These two men were sitting side by side and they looked at each other and smiled. That's why they were struck.

"Twenty-six struck at Mr. Thomas's suggestion based upon the address.

"Twenty-seven same; struck at Mr. Thomas's suggestion based on the address shown.

And number 8 was struck because she was a social service aide and I though that based upon that profession she mght be a very good witness, or juror rather for the prosecution [sic defense]."

As the record indicates, the trial judge took no part in the exchange between defense counsel and the prosecutor regarding the Batson issue. We can only conclude that the trial judge found that the defendant had failed to prove the prima facie case under Batson at the previous sidebar conference. There has been a great amount of confusion over the interpretation to be given to Batson, despite our attempt in Ex parte Branch, 526 So. 2d 609 (Ala. 1987), to avert such

confusion. We take this opportunity to clarify the Batson analysis.

Batson was intended to alleviate the harsh burden placed on criminal defendants by the decision in Swain v. Alabama, 380 U.S. 202 (1965), and its requirement of showing "systematic exclusion." The Batson analysis would allow the court to scrutinize the jury selection process where discrimination is shown in a single case. By contrast, Swain presented nearly an "insurmountable" burden to the defendant because it required proof of a pattern of discrimination involving several cases. See, Developments -- Race And The Criminal Process. 101 Harv. L. Rev. 1472 (1988).

Batson requires the presence of three elements to establish a prima facie case of racial discrimination in the selection of a petit jury. The defendant must first prove that he is a member of a cognizable minority

and that peremptory challenges were used to remove members of his race from the jury. Second, the defendant is entitled to rely on the fact that a peremptory challenge will allow a prosecutor to make discriminatory choices in jury selection if he chooses to do so. Finally, the defendant must prove from these and any other relevant facts that he may be aware of that an inference of discrimination may be drawn from the prosecutor's conduct. The first two legs of this analysis are easily understood; however, it is the third leg that has apparently caused much of the confusion over whether a prima facie case of discrimination has been proven in a given situation.

Scholarly comment has often expressed concern over the lack of clear standards for the Batson analysis. One commentator states:

> "Beyond the bare showing of cognizable group affiliation, the defendant's prima facie case consists of whatever evidence he can muster to convince the

> trial judge that the prosecutor has acted improperly, viewed in light of the inherently manipulable nature of peremptory challenges. Given the Court's nebulous description of the prima facie case, it is not surprising that there are almost as many concepts of sufficiency proof of discrimination as there are reviewing courts.
>
> "The most troubling aspect of the prima facie inquiry arises when the only relevant circumstance is the number of minority jurors removed from the jury. In this type of case, the court may be forced to play an often confusing numbers game to decide whether a 'pattern' of discriminatory strikes exists. Decisions based upon numbers alone necessarily assume a somewhat arbitrary character and are a major reason for the often contradictory outcomes in lower court decisions.
>
> "Justice White indicated that a defendant could not establish a prima facie case merely by demonstrating that the prosecutor struck one or more blacks from the jury. Perhaps relying on this statement, a number of courts have refused to find a prima facie case when the prosecutor removed several blacks from the jury but could have removed an even greater number."

Note, Batson v. Kentucky And The Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection. 74 Va. L. Rev. 811, 821 (1988).

In Ex parte Branch, 526 So. 2d 609 (Ala. 1987), this Court set out certain specific kinds of conduct by a prosecutor that would raise the inference of discrimination under Batson. In Ex parte Branch, we stated:

> The following are illustrative of the types of evidence that can be used to raise the inference of discrimination:
>
> 1. Evidence that the 'jurors in question share[d] only this one characteristic -- their membership in the group -- and that in all other respects they [were] as heterogeneous as the community as a whole.' Wheeler, 22 Cal.2d at 280, 583 P.2d 280 at 764, 148 Cal.Rptr. at 905. For instance 'it may be significant that the persons challenged, although all black, include both men and women and are [of] a variety Of ages, occupations, and social or economic conditions,' Wheeler, 22 Cal.3d at 280, 583 P.2d at 764, 148 Cal.Rptr. at 905, n. 27, indicating that race was the deciding factor.
>
> "2. A pattern of strikes against black jurors on the particular venire; e.g., 4 of 6 peremptory challenges were used to strike black jurors. Batson, 476 U.S. at 97, 106 S.Ct. at 1723.
>
> "3. The past conduct of the state's attorney in using peremptory challenges to strike all blacks from the jury venire. Swain, suora.

"4. The type and manner of the state's attorney's questions and statements during voir dire, including nothing more than desultory voir dire. Batson, 476 U.S. at 97, 106 S.Ct. at 1723;; Wheeler 22 Cal.3d at 281, 583 P.2d 764, 148 Cal.Rptr. at 905.

"5. The type and manner of questions directed to the challenged juror, including lack of questions, or a lack of meaningful questions. Slappy v. State, 503 So. 2d 350, 355. (Fla.Dist.Ct.App. 1987); People v. Turner, 42 Cal.3d 711, 726 P.2d 102, 230 Cal.Rptr. 656 (1986); People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748, 764, 148 Cal.Rptr. 890 (1978)

"6. Disparate treatment Of members of jury venire with the same characteristics, or who answer a question in the same or similar manner; e.g., in Slappy, a black elementary school teacher was struck as being potentially too liberal because of his job, but a white elementary school teacher was not challenged. Slappy. 504 So. 2d at 352 and 355.

"7. Disparate examination of members of the venire; e.g., in Slappy a question designed to provoke a certain response that is likely to disqualify a juror was asked to black jurors, but not to white jurors. Slappy. 503 So. 2d at 355.

"8. Circumstantial evidence of intent may be proven by disparate impact where all of most of the challenges were used to strike blacks

from the jury. Batson, 476 U.S. at 93, 106 S.Ct. at 1721; Washington v. Davis, 426 U.S. at 242, 96 S.Ct. at 2049.

"9. The state used peremptory challenges to dismiss all or most black jurors. See Slappy, 503 So.2d at 354, Turner, supra."

Branch, 526 So. 2d at 622-23.

Statistical evidence may also suffice to show an inference of discrimination, although statistics are not the sole possible method of proving intentional exclusion. United States v. David, 803 F.2d 1567, 1571 (11th Cir. 1986).

This list of prosecutorial wrongs is not exclusive. Other factors may also suffice to raise an inference of discrimination and complete the defendant's prima facie case. The trial judge has discretion in finding whether a prima facie case of purposeful discrimination has been proven. That finding is entitled to considerable deference on appeal. The trial judge must be sensitive, however, to the demands of equal protection of

the laws. It has been stated that the removal of even one juror for a discriminatory reason is a violation of the equal protection rights of both the excluded juror and the minority defendant. United States v. David, 803 F.2d 1567 (11th Cir. 1986). Moreover, this is true even though blacks may be seated on the petit jury and there were valid race neutral reasons for striking other blacks from the jury. Id. at 1571. See United States v. Hughes, 864 F.2d 78, 79 (8th Cir. 1988); United States v. Horseley, 864 F.2d 1543, 1546 (11th Cir. 1989).

In this attempt to clarify what we consider to be the appropriate Batson inquiries, we find persuasive the reasoning of the Supreme Court of South Carolina in the case of State v. Jones, 293 S.C. 54, 358 S.E. 2d 701 (1987). In that case, the defendant, as in the case at bar, was charged with a drug offense and objected to the empaneling of the

trial jury on Batson grounds. The South Carolina Supreme Court, after enumerating the elements of the Batson analysis, noted that the trial judge had neither made a finding of a prima facie case on the record nor held a Batson hearing. The Jones court also noted that the finding of a prima facie case could not be ruled out as a matter of law after a review of the record. Id. 293 S.C. at ____, 358 S.E.2d at 702-03.

Under Batson, much discretion is left to the trial court judge to determine whether the defendant has established a prima facie case. Batson, 476 U.S. at 97. This discretion left in the trial court necessarily contemplates a case-by-case analysis of the presence or absence of a prima facie case. The court in State v. Jones, supra, offered the following solution to this problem:

> "Rather than deciding on a case by case basis whether the defendant is entitled to a hearing based upon a prima facie showing of purposeful discrimination

> under the vague guidelines set forth by the United States Supreme Court, the better course to follow would be to hold a Batson hearing on the defendant's request whenever the defendant is a member of a cognizable racial group and the prosecutor exercises peremptory challenges to remove members of defendant's race from the venire. This bright line test would ensure consistency by removing any doubt about when a Batson hearing should be conducted. Further, this procedure would ensure a complete record for appellate review.
>
> "In all future jury trials, therefore, we recommend that the trial court hold a Batson hearing whenever 1) the defendant requests such a hearing; 2) the defendant is a member of a cognizable racial group; and 3) the prosecutor exercises peremptory challenges to remove members of defendant's the venire."

293 S.C. at _____, 358 S.E. 2d at 703.

Adopting this analysis, we hold that an otherwise qualifying defendant is entitled to a Batson inquiry when he makes his objection to the empanelment of the jury after it is selected but before it is sworn. At that point, the trial judge must conduct a Batson inquiry on the record but out of the hearing

of the jury. The defendant must then prove a prima facie case of discrimination under Batson. If the trial court determines that a prima facie case exists, the prosecution must then come forward with a race-neutral explanation as to why peremptory challenges were used to exclude members of a minority.[1] Where the prosecution fails to offer a reasonable explanation for its strikes, jury selection must begin anew. State v. Jones, 293 S.C. 54, 358 S.E. 2d 701 (1987).

In the present case, we agree with the Court of Criminal Appeals that this cause must be remanded to the trial court with directions

---

1-There are many possible reasonable explanations for such strikes. Batson demands that such strikes be related to the case to be tried and not be related to the defendant's and the jurors' shared race. Batson, 476 U.S. 79, 97-98 (1986). In a given case, the following factors may be relevant and may suffice to defeat the defendant's prima facie case: [Continued, next page]

that the trial court hold a hearing to determine whether the tenets of Batson and Branch, as modified herein, have been followed. The defendant may not prove his prima facie case solely from the fact that the

[footnote continued]

1. Age, fringe religious beliefs, body english, handwriting, and name association in certain instances. Tolbert v. State, 315 Md. 13, 553 A.2d 228 (1989); Chambers v. State, 724 S.W. 2d 440 (Tex. Ct. App. 1987).

2. Demeanor of the juror. United States v. Forbes, 816 F.2d 1006, 1010 (5th Cir. 1987).

3. Fact that prospective juror, like defendant, may be young, single, and unemployed: fact that prospective juror was struck because divorced and of low income occupation, in favor of a professional, married person; avoidance of eye contact with prosecutor. United States v. Cartlidge, 808 F.2d 1064, 1070-71 (5th Cir. 1987).

From a condsideration of these factors it is clear that the expalanation need not rise to the level of a challenge for cause. Batson, 476 U.S. at 97. However, a clear, reasonable explanation for the strike must be given. Ex parte Branch, 526 So.2d 609 623-24 (Ala. 1987).

prosecutor struck one or more blacks from his jury. United States v. Lane, 866 F.2d 103, 106 (4th Cir. 1989). The defendant must offer some evidence in addition to the striking of blacks that would raise tne inference of discrimination. In determining whether the evidence is sufficient to create an inference of discrimination, the court should look to the factors listed in Branch, supra, for guidance. However, that list is not an exclusive rendition of the facts that may create the inference. The trial court must use its discretion in weighing this kind of fact question, but this discretion must be tempered by a concern for the defendant's right t equal protection of the laws.

Trial courts should not require a strict or rigid quantum of proof defendant of the Batson elements. Rather, out of a concern for equal protection and justice under the law, trial courts must be sensitive to the

defendant's Batson claims, and should not lightly brush them aside. Batson demands that, in deciding whether the defendant has carried his burden of proving a prima facie case, the trial court "must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" Batson, 476 U.S. at 93. Only after such an inquiry on the record may a Batson objection be properly overruled. Only under these circumstances is the trial court's ruling entitled to the standard of defference governing review of the trial court's discretion.

The judgment of the Court of Criminal Appeals is affirmed. AFFIRMED.

Jones, Shores, Houston, and Kennedy, JJ. concur.

APPENDIX C

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

STATE OF ALABAMA	*	
Plaintiff,	*	
vs.	*	CASE NO.: CC88-830
JOE LOUIS HARRELL,	*	CC88-831
Defendant.	*	

ORDER

This cause having been remanded to this Court to conduct a hearing to determine whether or not the guidelines of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, have been complied with, and the Court having conducted said hearing, the Court finds as follows:

That the prosecutor has failed to provide the Court with facially race neutral

reasons for its peremptory challanges which are credible under the law.

It is ORDERED, pursuant to the Order of the Court of Criminal Appeals, that a copy of this order be forwarded to the Court of Criminal Appeals for further proceedings.

DONE at Mobile, Alabama this 17th day of January, 1990.

/s/BRAXTON L. KITTRELL, JR.
Circuit Judge

cc: Honorable Chris Galanos
District Attorney

Paul Brown, Esquire filed 1/17/90

APPENDIX D

[RELEASED APRIL 27, 1990]

THE STATE OF ALABAMA - - - JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1989-90

1 Div. 779

Joe Louis Harrell

v

State

Appeal from Mobile Circuit Court
CC-88-830 and CC-88-831
ON RETURN TO REMAND

BOWEN, JUDGE

This Court remanded this cause to the circuit court for application of the principles of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), as interpreted by Ex parte Branch, 526 So.2d 609 (Ala. 1987). After an evidentiary hearing, the trial judge found that "the prosecutor has failed to provide the Court with facially race neutral reasons for its peremptory challenges which are credible under the law."

Therefore, the judgment of conviction is reversed and this cause is remanded to the circuit court for further proceedings.

REVERSED AND REMANDED.

All Judges concur.

APPENDIX E.

[RELEASED NOV. 30, 1990]

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1990-91

89-1472

Ex parte State of Alabama

PETITION FOR WRIT OF CERTIORARI TO T#E COURT OF CRIMINAL APPEALS

Joe Louis Harrell

v.

State of Alabama)

(Mobile Circuit Court, CC-88-830, -831)

HOUSTON, JUSTICE.

This is the second time that this case has been before this Court on certiorari review. The defendant, Joe Louis Harrell, was convicted in Mobile Circuit Court of possession of cocaine and other offenses. Harrell challenged his conviction in the Court of Criminal Appeals, based upon the rule of law stated in Batson v. Kentucky. 476 U.S.

79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The Court of Criminal Appeals remanded the case with instructions for the trial court to determine whether the guidelines of Batson as interpreted by this Court in Ex parte Branch, 526 So.2d 609 (Ala. 1987), had been followed. See Harrell v. State, 555 So.2d 257 (Ala.Crim.App. 1989). The State petitioned for a writ of certiorari, which we granted pursuant to Rule 39, A.R.App.P., and we affirmed the judgment remanding the case for a Batson hearing. See Harrell v. State, 555 So.2d 263 (Ala. 1989).

On remand, the trial court determined that Harrell had made a prima facie showing of purposeful discrimination on the part of the prosecutor in selecting the jury and that the prosecutor had failed to present race-neutral reasons for challenging 5 of the 10 black jurors on the venire. On return to remand, the Court of Criminal Appeals vacated

Harrell's conviction and remanded the case for a new trial. The case is once again before this Court on certiorari review, pursuant to a petition filed by the State in which it argues that the following undisputed facts established, as a matter of law, that the prosecutor did not engage in purposeful discrimination when she struck the blacks from the jury venire: 1) The lawfully established venire consisted of 28 people, of whom 10 (35.7%) were black; 2) the prosecutor used 5 of her 8 peremptory challenges to strike blacks and the remaining 3 to strike whites; 3) defense counsel used all 8 of his peremptory challenges to strike whites from the venire; and 4) the jury that was ultimately empanelled consisted of 5 blacks, amounting to 41.7% of the jury (a greater percentage than was on the lawfully established venire), and 7 whites.

If these were the only facts Harrell relied on to raise an inference of

discrimination, we would agree with the State and reverse the judgment of the Court of Criminal Appeals. As we explained in Harrell, supra, a defendant cannot prove a prima facie case of purposeful discrimination solely from the fact that the prosecutor struck one or more blacks from his jury. A defendant must offer some evidence in addition to the striking of blacks that would raise an inference of discrimination. When the evidence shows only that blacks were struck and that a greater percentage of blacks sat on the jury than sat on the lawfully established venire, an inference of discrimination has not been created. Logically, if statistical evidence may be used to establish a prima facie case of discrimination, by showing a discriminatory impact Harrell, 555 So.2d 267, citing United States v. David, 803 F.2d 1567, 1571 (11th Cir. 1986), then it should also be available to show the absence of a discriminatory purpose.

However, in addition to the foregoing, the record shows that the five blacks who were struck from the venire shared only one characteristic -- their membership in the black race -- and that in all other respects they were as heterogeneous a group as the community as a whole. For instance, three of the five blacks struck were men and two were women. Two of the men were employed, one as a helper at Moyer Allied and one as a mechanic at Auto Savings Tire Company. One of the women was a housewife, and the other was employed as a social service aide. The fact that the blacks struck include both men and women and that they were of a variety of ages, occupations, and social or economic conditions, indicates that race may have been the deciding factor. Harrell, supra, at 266. Furthermore, the prosecutor engaged in a rather limited voir dire, asking only whether any of the members of the venire had been the

victim of a crime; whether any of them, or anyone in their immediate family or close circle of friends, had been charged with a crime; whether any of them had any religious beliefs that would effectively prevent them from sitting in judgment on Harrell; and whether any member of the venire thought that possession of marijuana or cocaine should not be a crime. The record fails to show that any of the five blacks responded to the prosecutor's questions in such a way as to give any insight into why they were stricken. The extent of the prosecutor's questions during voir dire and the responses of the venire members to those questions are also relevant in determining whether the prosecutor engaged in purposeful discrimination. Harrell, supra, at 266. Finally, we take judicial notice of Jones v. Davis, 906 F.2d 552 (11th Cir. 1990), in which the United States Court of Appeals, Eleventh Circuit,

reversed the district court's denial of habeas corpus relief for Jones, noting that Jones had established a prima facie case of discrimination under Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), on the part of the Mobile County district attorney's office and that that prima facie case had not been rebutted. The past conduct of the prosecutor in using peremptory challenges to strike all blacks from the jury venire is an important factor to be considered in determining whether an inference of discrimination exists. Harrell, supra, at 266. These additional facts, when considered in light of the fact that the prosecutor used five of her eight peremptory challenges to strike blacks from the venire, were sufficient to raise an inference of discrimination in the present case. See Harrell, supra, at 266-67, where this Court, quoting Ex parte Branch, discussed in detail the types of evidence that

would suffice to make out a prima facie case of purposeful discrimination. Due to the considerable deference that the trial court's determination was due, we cannot say that the Court of Criminal Appeals erred in vacating Harrell's conviction and in remanding the case for a new trial.

For the foregoing reasons, the writ is quashed as improvidently granted.

WRIT QUASHED AS IMPROVIDENTLY GRANTED.

Hornsby, C. J., and Jones, Shores, and Kennedy, JJ., concur.

APPENDIX F

THE STATE OF ALABAMA - - - JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

December 17, 1990

89-1472

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (Re: Joe Louis Harrelll v. State)

(CCA 1/779 (Mobile CC-88-830, 831))

The petitioner having filed a motion to withdraw and stay the certificate of judgment in this cause pending review by the U. S. Supreme Court, and said motion, having; been duly considered by the Court,

IT IS ORDERED AND ADJUDGED that said motion: to withdraw and stay the certificate of judgment in this cause be, and the same is hereby, denied.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 17 day of Dec. 1990.

/s/Robert G. Esdale

Clerk, Supreme Court of Alabama

APPENDIX G

RELEVANT ALABAMA STATUTES

Code of Alabama , 1975:

Title 12, § 12-16-100. DRAWING, SELECTION AND EMPANELING OF JURIES IN CRIMINAL CASES - GENERALLY.

(a) In every criminal case the jury shall be drawn, selected and empaneled as follows; Upon the trial by jury in the circuit courts of any person charged with a felony, including a capital felony, a misdemeanor, or violation, the court shall require a strike list or lists to be complied from the names appearing on the master strike list as established in section 12-16-74. In compiling the list or lists, names of qualified jurors may be omitted on a nonselective basis. A strike list shall be furnished for the trial of any case at hand and a copy thereof given to all parties. the jurors whose names appear thereon shall be brought into open court, the case shall be called and in the presence of

the district attorney and the defendant and his attorney, the jurors shall be examined on voir dire for the trial of the case at hand. After the conclusion of the voir dire examination and the removal from the strike list of the names of those jurors who were challenged or excused for good reason, the district attorney shall be required first to strike from the strike-list the name of one juror, and the defendant shall strike one, and they shall continue to strike off names alternately until only 12 jurors remain on the strike list and these 12 jurors thus selected shall be the jury charged with the trial of the case. If any defendant shall refuse to exercise a strike to which he is entitled, then the judge presiding shall exercise that defendant's strike for him. The number of names appearing on the strike list upon commencement of striking, unless a lesser number is agreed to by the parties, shall not

be less than 36 if the offense charged is a capital felony nor less than 18 if the offense charged is a misdemeanor or violation. In the event the list of competent prospective jurors is reduced to fewer than the number required by this subsection, the court shall add prospective jurors in the manner prescribed in section 12-16-76. No special venire shall be ordered, drawn, or summoned for the trial of any person indicted for a capital felony.

(b) The court may in its discretion qualify such alternate jurors as it deems necessary, except that in capital cases the court shall qualify at least two alternate jurors, as required by law. Alternate jurors shall be drawn from the venire in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the principal

jurors, except that they shall not deliberate with the jury or vote upon the verdict unless designated to replace a principal juror. An alternate juror who does not replace a principal juror shall be discharged at the time the jury retires to consider its verdict.

(c) If the court determines that more than two alternate jurors shall be selected in a capital case, or that one or more alternate jurors shall be selected in a noncapital case, upon commencement of striking, unless the parties consent to the use of a lesser number, the minimum number of names required on the strike list in subsection (a) shall be increased by two for each alternate juror to be selected; provided that such increase in names shall not apply for the first two alternate jurors to be selected in a capital case. The parties shall then strike from the strike list as herein provided until there remain 12 jurors. The last juror or jurors

struck shall be the alternate or alternates, and if it becomes necessary for an alternate to replace a principal juror, the last juror struck shall be designated. The identity of alternate jurors shall not be divulged to the jurors until the jury retires for deliberation.

(d) Any county having existing laws on April 15, 1982 establishing procedures for the selection and use of alternate jurors, may at the election of the presiding circuit judge, continue to follow the provisions of such law with respect to the selection of alternate jurors. Such election must be made in writing within 30 days of April 15, 1982 and filed with the secretary of state, the clerk of the supreme court, the administrative office of courts and the local bar of the county affected thereby. At any time after said election, either the presiding circuit judge, or a majority of the circuit judges in the circuit wherein the county is located, may elect to

come under the provisions of this chapter by filing written notice as required above.

Title 13A, §13A-12-212. UNLAWFUL POSSESSION OR RECEIPT OF CONTROLLED SUBSTANCES.

(a) A person commits the crime of unlawful possession of controlled substance if:

(1) Except as otherwise authorized, he possesses a controlled substance enumerated in schedules I through V.

(2) He obtains by fraud, deceit, misrepresentation or subterfuge or by the alteration of a prescription or written order or by the concealment of a material fact or by the use of a false name or giving a false address, a controlled substance enumerated in schedules I through V.

(b) Unlawful possession of a controlled substance is a Class C felony.

§13A-12-213. UNLAWFUL POSSESSION OF MARIHUANA IN THE FIRST DEGREE.

(a) A person commits the crime of unlawful possession of marihuana in the first degree if, except as otherwise authorized:

(1) He possesses marihuana for other than personal use; or

(2) He possesses marihuana for his personal use only after having been previously convicted of unlawful possession of marihuana in the second degree or unlawful possession of marihuana for his personal use only.

(b) Unlawful possession of marihuana in the first degree is a Class C felony.

§13A-12-214. UNLAWFUL POSSESSION OF MARIHUANA IN THE SECOND DEGREE.

(a) A person commits the crime of unlawful possession of marihuana in the second degree if, except as otherwise authorized, he possesses marihuana for his personal use only.

(b) Unlawful possession of marihuana in the second degree is a Class A misdemeanor.

APPENDIX H

IN RE: FACTORS FOUND BY THE ALABAMA SUPREME COURT TO INDICATE DISCRIMINATORY INTENT

The Alabama Supreme Court found that discriminatory intent was shown factors"

1. That the black venirepersons struck by the prosecution had only one common characteristic, race. (Appendix "E", page 50)

This is simply not so. The record shows that these people were struck because they came from neighborhoods where drugs were prevalent. The defense did not take issue with Mr. Thomas' assertion that such was the case. The relevance of such factors in a drug prosecution is obvious: Such persons are more likely than others to be directly or indirectly involved with drugs and are very likely to be subject to or at least fear reprisal by drug dealers.

In addition, it is hardly surprising that the black veniremen struck by the prosecutor had little in common except race, since wherever people are classified according to an arbitrary factor like race, that factor is invariably the only thing the people so classified have in common. Thus, if one considered the white people struck or the black people left on the jury or the white people left on the jury by the Prosecutor or the white people struck by the defense, one would in each case find that the members of the group have little in common but race.

This analysis by the Alabama Supreme Court seems to be based on an assumption that a prosecutor's strikes will all be motivated by the same reason; a reason which can be discovered by determining what factor all of the struck venirepersons had in common. Thus, the reasoning seems to be, if race is the only common factor that must be the reason for the

strikes. But, a prosecutor may strike six persons for six different but perfectly valid reasons.

The proper consideration in this area is whether race was the common factor among all of the persons struck by the prosecution or all those the prosecutor chose to retain on the jury. If it was, such is evidence of discriminatory intent. If, as here, race is not a common factor among either group, this is evidence that there was no discriminatory intent.

2. The prosecution engaged in rather limited voir dire of the venire. (Appendix "E", pages 50-51)

This was not a complex case. If the jury believed the officers a conviction would follow. The voir dire indicated a concern for bias in favor of drugs or against drug prosecutions. The same concern was evidenced in the striking of veniremen from neighborhoods known to have a prevalence of drugs.

3. The fact that the court in Jones v. Davis (906 F.2d 552 [11th Cir, 1990]) had found that a prima facie case had been made out that a prosecutor, who had left the Mobile District Attorney's office some time before the instant prosecution, had practiced racial discrimination in a pre-Batson prosecution. (Appendix "E", pages 51-52)

The "reasoning" here seems to be: One time a former prosecutor from this office may have practiced racial discrimination, therefore, all prosecutors from this office must be suspected of practicing racial discrimination for all time. This is precisely the sort of stereotyping which rules like that of Batson are designed to outlaw.

4. The fact that the prosecution used one more strike against black venirepersons than against white venirepersons. (Appendix "E", page 52) However, this fact must be viewed in light of the fact that the defense

struck white veniremen exclusively. See, for example, United States v. Saugineto-Miranda, 859 F.2d 1501, 1522 (6th Cir, 1988).

APPENDIX I

[RELEASED: January 11, 1991]

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1990-91

89-1540

Ex parte Timothy John Yelder

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(Re: Timothy John Yelder

v.

State)

(Montgomery Circuit Court, CC-88-1544, -1545, and -1546)

SHORES, JUSTICE.

This petition for certiorari presents a case of first impression in Alabama. Yelder argues that he was denied effective assistance of counsel in that at his trial his lawyer did not object, under Batson v. Kentucky, 476 U.S. 79 (1986), to the State's use of its peremptory challenges to strike 17 of 18 black jurors. The legal standard for determining claims of

ineffective assistance of counsel is set out in Strickland v. Washington, 466 U.S. 668 (1984):

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable."

466 U.S. at 687. See, also, Ex parte Lawley, 512 So.2d 1370, 1372 (Ala. 1987). As to the first part of the Strickland test, the standard for attorney performance is an objective one, that is, "reasonableness under prevailing norms," 477 U.S. at 688,. and "any deficiencies in counsel's performance must be prejudicial to the defense in order to

constitute ineffective assistance under the Constitution." 466 U.S. at 692. In cases involving denial of assistance of counsel, counsel's conflict of interest, or state interference with counsel's assistance, prejudice will be presumed, id., but in all other cases, prejudice must be "affirmatively" proved. 466 U.S. at 693. The standard for determining prejudice is also set forth in Strickland:

> "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.... In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury."

466 U.S. at 694, 695.

Yelder argues that an additional category under the "presumed prejudice" exception should be created: failure of trial

counsel to make a timely Batson objection when a prima facie case exists of purposeful discrimination by the State in the jury selection process. In order to protect and preserve the holding of Batson (that ["p]urposeful racial discrimination in selection of the venire violates a defendant's right to equal protection," Batson, 476 U.S. at 86) and to bolster public confidence in the fairness of our system of justice, 476 U.S. at 87, we agree with Judge Bowen's dissent that it is necessary to create the suggested additional category under the "presumed prejudice" exception of Strickland. Accordingly, we reverse that portion of the judgment of the Court of Criminal Appeals that addresses the issue of effective assistance of counsel, and we remand the case to the Court of Criminal Appeals with directions to remand it to the trial court for a hearing on the Batson question.

FACTS

Timothy John Yelder was convicted of rape in the first degree, a violation of §13A-6-61, Code of Alabama 1975; burglary in the first degree, a violation of §13A-7-5; and robbery in the first degree, a violation of §13A-8-41. At the sentencing hearing, the trial court sentenced Yelder to life imprisonment on the rape charge, 25 years' imprisonment on the burglary charge, and 50 years' imprisonment on the robbery charge.

Yelder moved for a new trial and later amended his motion to include the ineffective assistance of counsel argument now before us. The trial court held a hearing to consider Yelder's motion, and denied it. Yelder appealed to the Court of Criminal Appeals, which affirmed his convictions. See Yelder v. State, [Ms. 3 Div. 95, May 25, 1990] ___ So.2d ___ (Ala. Cr. App. 1990). We granted Yelder's petition for writ of certiorari.

The Strickland Test and Presumed Prejudice

In his dissent, Judge Bowen correctly noted that the Strickland test for prejudice, excluding those instances of presumed prejudice, is outcome-determinative in nature; that is, it must appear that, absent the lawyer's error, there is a reasonable probability that the result of the trial would have been different. Judge Bowen correctly states that such an outcome-determinative test "is simply not the proper criterion for measuring prejudice in the context of a Batson error." and he says, "Applying this measure of prejudice to a Batson error would be, in effect, requiring the appellant to prove that, had blacks not been unfairly removed from his jury, the factfinder might have acquitted him!" (Bowen, J., dissenting).

It is the assumption cited by Judge Bowen that Batson was designed to combat:

> "Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors [citation omitted], so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race."

476 U.S. at 97-98. If an outcome-determinative test is used, then no black appellant could prove prejudice unless he relied on the very assumption that Batson condemns.

In Batson, the Court noted the importance of maintaining fairness within our system of justice so as not to undermine public confidence. In Ex parte Jackson, 516 So.2d 768 (Ala. 1986), we required the retroactive application of Batson. In doing so, we noted, "Although we know that the

United States Supreme Court has not yet ruled on whether Batson v. Kentucky is to be applied retroactively, this Court does not need to await revelation from the federal judiciary...." 516 So.2d at 772. Strickland was decided two years before Batson, so it did not anticipate claims of alleged ineffectiveness in the context of the Batson issue. Had Strickland anticipated that issue, we are certain it would have included that issue as one of those in regard to which prejudice is presumed. We need not await enlargement of Strickland by the federal courts to hold that prejudice is presumed where Batson violations are established in the context of a charge of ineffective counsel.

CONCLUSION

We adopt the dissenting opinion of Judge Bowen and hold that the failure of trial counsel to make a timely Batson objection to a prima facie case of purposeful discrimination

by the State in the jury selection process through its use of peremptory challenges is presumptively prejudicial to a defendant. Accordingly, we reverse the judgment of the Court of Criminal Appeals to the extent that it holds to the contrary, and we affirm the other aspects of the judgment, and we remand the case with directions to remand it to the trial court for a Batson hearing.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Hornsby, C. J., and Jones, Houston, Steagall, and Kennedy, JJ., concur.

Maddox, J., dissents.

Ex parte Yelder

MADDOX, JUSTICE, (dissenting)

I agree with the majority opinion of the Court of Criminal Appeals, Yelder v. State, [Ms. 3 Div. 95, May 25, 1990] ___ So.2d ___ (Ala. Crim. App. 1990); therefore, I must dissent.

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, hereby certify that on this _____ day of _____, 1991, I did serve the requisite number of copies of the foregoing on the Attorney* for Joe Louis Harrell, Respondent, and his former attorneys** by mailing the same to said Attorneys first class postage prepaid and addressed as follows:

Honorable Paul Brown*
Attorney at Law
Post Office Box 1261
Mobile, Alabama 36633

Honorable Barbara Brown**
Attorney at Law
359 St. Francis Street
Mobile, Alabama 36602

Honorable T. Jefferson Deen**
Attorney at Law
207 Church Street
Mobile, Alabama 36602

JOSEPH G.L. MARSTON, III
ASSISTANT ATTORNEY
GENERAL OF ALABAMA

ADDRESS OF COUNSEL:

Office of the Attorney General
Criminal Appeals Division
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

2679P